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Supreme Court, U.S.
FILED
No. _____ 041197 MAR 7 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEONARD F. PRESCOTT, *et al.*,

Petitioners,

v.

LITTLE SIX, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

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PETITION FOR A WRIT OF CERTIORARI

Leonard Prescott, F. William Johnson and Peter Riverso respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-10) is reported at 387 F.3d 753 (8th Cir. 2004). The district court opinion (App. 11-25) is reported at 284 F. Supp.2d 1224 (2003).

JURISDICTION

The Eighth Circuit filed its decision on October 21, 2004, and entered an order denying petitioners' timely petition for rehearing on December 8, 2004. App. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a) provides in part:

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the

terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1003(a) provides in part:

> Except as provided in subsection (b) of this section and in sections 1051, 1081 and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained –
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce.

29 U.S.C. § 1002(3) provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

STATEMENT OF FACTS

Petitioners Leonard Prescott, F. William Johnson and Peter Riverso are former employees of respondent Little Six, Inc. (LSI). App. 2. LSI is a tribal corporation established by the Shakopee Mdewakanton Sioux (Dakota) Community, a federally recognized Indian tribe, to operate the community's on-reservation gaming activities. *Id.*

After several key employees departed for other jobs, LSI began exploring a variety of employee benefit plans to remain competitive in the marketplace. Working through outside counsel, LSI developed an executive benefits program consisting of five separate plans to provide pension and welfare benefits to eligible employees including

petitioners. During the plan drafting process, LSI's lawyers advised the corporation that ERISA applied in Indian country and would govern the plans. App. 19-20. Consequently, "LSI itself believed that the plans were subject to ERISA." App. 19.

As part of the administration of its benefit program, LSI prepared and distributed summary plan descriptions and individual benefit statements to petitioners and other plan participants. The summary plan descriptions for the LSI Life Insurance Plan, the LSI Separation Pay Plan and the LSI Supplemental Retirement Plan delineated the participants' "ERISA rights" and assured each that:

> 1. If you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court.
>
> 2. If you have a claim for benefits which is denied or ignored, in whole or part, you may file suit in a state or federal court.
>
> 3. If it should happen that plan fiduciaries misuse the Plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court.

App. 22-23.

After leaving LSI employment, petitioners requested benefit information and payment of benefits due them under the plans. When LSI refused to comply, petitioners brought suit in United States District Court seeking

benefits and penalties under 29 U.S.C. §§ 1132(a)(1)(B) and (c).[1]

Invoking the tribal exhaustion doctrine, the district court abstained from deciding the matter, dismissed the complaint and directed Petitioners to litigate the validity of the plans in the first instance before the tribal court. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995). The district court informed the parties, however, that after tribal remedies were exhausted the tribal court's determinations of federal law would be subject to *de novo* review by the federal courts. *Id.* at 1224, n.6.

The tribal trial court conducted a three-day hearing and found that all of the plans were validly created and approved as a matter of law by the LSI board of directors. App. 18. In reaching its decision, the tribal trial court made numerous factual findings. It found, *inter alia*, that cash benefits were paid under the plans to other participants, that amounts were credited to deferred accounts for plan participants and that money was transferred by LSI to a trust from which assets were disbursed to satisfy benefit claims made under the plans. *Id.*

Despite acknowledging that the plans existed in some form, LSI appealed to the tribal court of appeals. Significantly, LSI mounted no challenge to the factual findings made by the tribal trial court in its appeal. App. 20.

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[1] ERISA federalizes claims to collect benefits due, enforce rights under covered plans and to clarify future rights to plan benefits but confers concurrent jurisdiction on state and federal courts to decide such claims. 29 U.S.C. § 1132(a)(1)(B). Actions against a plan administrator for failure to supply requested information that it is required to provide to plan participants under ERISA remain subject to exclusive federal jurisdiction. 29 U.S.C. § 1132(e)(1).

Instead, LSI argued that its inability to locate an original corporate resolution signed by the LSI board of directors formally adopting the plans rendered its promises of benefits unenforceable. App. 18.

The tribal court of appeals sided with LSI. After adopting the tribal trial court's findings of fact, the tribal appeals court held that to recognize the plans without a formal board resolution would ignore the "carefully crafted body of law" established by the tribal corporate code. App. 19. Focusing on technical formalities ostensibly required by tribal law, the tribal court of appeals reversed the tribal trial court and dismissed all of Petitioners' claims. *Id.*

Petitioners renewed their complaint before the federal district court and sought review of the tribal court's interpretation of federal law. The district court held that federal law rather than tribal law supplies the appropriate standard for determining whether an ERISA plan exists. App. 24-25. Finding both that the plans had been adopted under federal law and that LSI had waived its sovereign immunity from suit in three of the plans, the district court denied, in part, LSI's motion to dismiss the complaint. App. 24-25.

LSI appealed to the Eighth Circuit Court of Appeals. App. 1-10. After concluding that LSI's adoption of a valid and enforceable benefits arrangement is an issue governed by tribal law, the Eighth Circuit reversed the district court's order and dismissed petitioners' complaint in its entirety. App. 8.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT: DOES FEDERAL LAW EXCLUSIVELY GOVERN WHETHER AN EMPLOYER HAS ESTABLISHED OR MAINTAINED A PLAN OR BENEFIT ARRANGEMENT FOR PURPOSES OF ERISA?

Congress enacted ERISA to provide uniform federal standards for establishing and maintaining employee pension and benefit plans. One of ERISA's express goals is to "protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Stated differently, ERISA seeks to "protect working men and women from abuses in the administration of private retirement plans and employee welfare plans," *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), and to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting 3 Leg. Hist. 4793, Senator Bentsen). Through the passage of ERISA, Congress sought to insure that when an employer promises an employee a pension benefit upon retirement, and the employee fulfills the required conditions, then the employee will actually receive the promised benefit. *Id.* at 374-75.

To safeguard employee benefit rights and spare employers from the difficulty of having to comply with a variety of conflicting and inconsistent regulations, ERISA

broadly preempts state and local laws that otherwise would affect covered plans. 29 U.S.C. § 1144(a); *Shaw v. Delta Air Lines*, 463 U.S. 85, 90-91 (1983). This Court has recognized that in establishing ERISA Congress intended:

> to ensure that [ERISA] plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-57 (1995) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

ERISA reaches all employee benefit plans that are established or maintained by an employer engaged in activities affecting interstate commerce and which provide pension or welfare benefits. 29 U.S.C. § 1003(a). No particular formalities or form of writing are required to establish an ERISA plan. *Donovan v. Dillingham*, 688 F.2d at 1372. Accordingly, courts have upheld informal, or *de facto*, plans in order to protect the legitimate expectations of employees who were promised plan benefits and reasonably relied on their employers' assurances that they would receive the same. *See, e.g., Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502-04 (9th Cir. 1985); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F. Supp. 454 (S.D.N.Y. 1988). At bottom, a plan need only invoke an "ongoing administrative program," *Fort Halifax Packing Co. v. Coyne*, 482

U.S. 1, 12 (1987), and be a "reality." *Donovan v. Dillingham*, 688 F.2d at 1373.

Since the statutory text of ERISA offers no guidance for determining if a plan has been "established or maintained," courts have looked to the facts and circumstances surrounding a benefit arrangement to discern whether an employer's promises are enforceable. *Id.* ("it is the reality of a plan, fund or program and not the decision to extend benefits that is determinative.").

The *Donovan* court was one of the first courts to consider the type of circumstances from which the existence of an ERISA plan may be inferred. In a well-reasoned decision, the Eleventh Circuit Court of Appeals, sitting *en banc*, developed the following test, which has since been consistently followed in ERISA litigation:

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, sources of financing and procedures for receiving benefits.

688 F.2d at 1373.

The *Donovan* approach has been adopted by all of the federal circuits. *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990); *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 151 (2nd Cir. 1994); *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391, 399 (3rd Cir. 1992); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240-41 (5th Cir. 1990); *Brown v.*

Amco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989); *James v. National Business Systems, Inc.*, 924 F.2d 718, 720 (7th Cir. 1991); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *Peckham v. Gem State Mut. Of Utah*, 964 F.2d 1043, 1047-48 (10th Cir. 1992); *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994).

State courts likewise follow the *Donovan* test to determine whether an employer has established an ERISA plan. *See, e.g., Marshall v. Bankers Life & Cas. Co.*, 2 Cal. 4th 1045, 832 P.2d 573, 578 (Cal. 1992) (*en banc*), *cert. denied*, 506 U.S. 1000 (1992); *Matter of Estate of Bickford*, 549 N.W.2d 804, 806 (Iowa 1996); *Vulcan v. United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1176 (Penn. Super. 1998); *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 750-51 (Tenn. App. 1995); *Shaw v. PACC Health Plan, Inc.*, 130 Or. App. 32, 881 P.2d 143, 146 (Or. App. 1994), *aff'd*, 322 Or. 392, 908 P.2d 308 (Or. 1995); *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 502 (Utah App. 1992); *Time Ins. Co. v. Roberts*, 191 Ga. App. 766, 382 S.E.2d 718, 719 (Ga. App. 1989).

Here, the tribal trial court also looked to the *Donovan* test for guidance. The tribal trial court considered evidence presented during a three-day evidentiary hearing at which ten witnesses testified and thousands of pages of documents were admitted. Thereafter, it made factual findings specifically determining that the plans at issue were a reality for both LSI and its employees. App. 18. The tribal trial court further found that LSI had assembled an ongoing administrative program through which it processed and paid actual cash benefits to other participants under the plans. App. 19. LSI has conceded the evidentiary support for the tribal trial court's findings and does

not dispute the soundness of that court's factfinding. App. 20. More importantly, the tribal court of appeals also accepted the validity of the tribal trial court's findings of fact without question. App. 18.

In concluding that the actual reality of the plans, as opposed to any paper formality, is dispositive, the tribal trial court followed firmly entrenched federal law. Its approach was wholly consistent with ERISA's underlying policy of protecting plan participants from employer abuses and prohibiting plan sponsors from shirking their obligations through the conscious or inadvertent failure to formally adopt a written plan. *Donovan v. Dillingham*, 688 F.2d at 1372 ("it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans . . . to circumvent the Act merely because an administrator . . . failed to satisfy reporting or fiduciary standards").

By contrast, the tribal court of appeals, and later the Eighth Circuit, ignored relevant legislative history and overwhelming case authority that seeks to protect plan participants while contemporaneously elevating corporate form over substance to reject the plans and the claims that petitioners' assert thereunder. That technically driven, myopic approach not only pulls the rug out from under benefits promised to Petitioners upon which they reasonably relied, *see Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985), but also contravenes ERISA's quest for national uniformity in the field of benefit regulation.

No other reported decision has looked to non-federal law to decide whether an ERISA plan was established or maintained. Instead, when state courts have invoked

concurrent jurisdiction to consider ERISA issues, they have uniformly looked to federal law to reach their decisions. *See, e.g., Montner v. Interfaith Medical Center*, 596 N.Y.S.2d 975, 981 (1993) ("in exercising concurrent jurisdiction, state courts are to apply federal law"); *Brown v. Zurich U.S.*, 779 N.E.2d 822, 827 (Ohio. App. 2002) (same).

Unquestionably, a primary purpose of ERISA is to protect individual pension rights. *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (citing H.R.Rep. No. 533, 93rd Cong., 2nd Session 1 (1974)). The primary means of insuring that protection is to permit plan participants and beneficiaries to bring suit to collect unpaid benefits. This court has recognized the "deliberate care with which ERISA's civil enforcement remedies were drafted" while acknowledging that benefit claims arise under federal law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-55 (1987) (citing H.R. Conf. Rep. No. 93-1280, p. 327 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5107). Indeed, Congress considered the reservation of ERISA plan regulation to federal law to be "the crowning achievement" of the Act. 120 Cong. Rec. 29197 (remarks of Sen. Javits). Only by maintaining a uniform, national approach to resolving ERISA disputes through the application of clearly defined federal common law can this Congressional mandate be fulfilled.

By granting certiorari, this Court can both remedy the error below and provide clear guidance to all other ERISA plan sponsors, beneficiaries, and courts directing that the issue of plan existence is a question of federal law that must be decided using the test set forth in *Donovan*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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March 7, 2005

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3702

Leonard F. Prescott, F. William Johnson, Peter Riverso, Appellees, v. LITTLE SIX, INC., in its capacity as plan administrator for the Little Six, Inc., Executive 457 Plan, the Little Six, Inc., Supplemental Retirement Plan, the Little Six, Inc., Life Insurance Plan, the Little Six, Inc., Separation Pay Plan and the Little Six, Inc., Retention Plan; The Little Six, Inc., Supplemental Retirement Plan; The Little Six, Inc., Life Insurance Plan; The Little Six, Inc., Separation Pay Plan; The Little Six, Inc., Retention Plan; The Little Six, Inc., Executive 457 Plan, Appellants.	*	Appeal from the United States District Court for the District of Minnesota.

Submitted: June 16, 2004
Filed: October 21, 2004

Before WOLLMAN, HEANEY, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Little Six, Inc. ("LSI"), a corporation organized pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community Indian tribe ("the Tribe"), appeals the decision of the District Court denying LSI's motion to dismiss claims brought by former executive employees of LSI for payment of benefits under employee benefit plans purportedly created by LSI. Because we determine that the District Court erred in not giving proper deference to a tribal court finding that the plans were not authorized under tribal law, we reverse and remand the case to the District Court and direct that the lawsuit be dismissed.

The Tribe created LSI in 1992 as a tribal corporation responsible for operating casinos owned by the Tribe pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000). The Plaintiffs, Leonard Prescott, F. William Johnson, and Peter Riverso, are former employees of LSI who served as chief executive officer, chief operations officer, and senior vice president, respectively. In late 1992 and early 1993, the Plaintiffs drafted certain employee benefit plans to be made available to executive-level employees of LSI (including the Plaintiffs). The LSI board of directors discussed the draft benefit plans at a number of meetings but never formally approved the plans. In 1994, following a tribal election, the LSI board of directors was replaced in its entirety. Shortly thereafter, the new LSI board of directors passed a resolution specifically refusing to adopt the draft benefit plans.

The Plaintiffs, nevertheless, sought payment of benefits under the draft plans from trusts that had been created in association with the draft plans. LSI took the position that both the draft plans and the trusts were not validly created and that the trust funds should be returned to LSI. In the face of these conflicting claims, the trustees of the trust filed an interpleader complaint in the Court of the Shakopee Mdewakanton Sioux (Dakota) Community, seeking the court's guidance about the legal status of the draft plans and the appropriate distribution of assets in the trust.

While the tribal court action was pending, the Plaintiffs brought suit in federal district court under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1053 (2000) ("ERISA"), seeking benefits under the plans and equitable relief. The district court dismissed the action, holding that the Plaintiffs were required to exhaust their tribal remedies before the district court could exercise jurisdiction. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1222 (D. Minn. 1995). The Plaintiffs then intervened in the ongoing tribal court action. The tribal trial court concluded that, though there was no written record memorializing approval of the plans by the LSI board of directors, the "actual reality" was that the plans had been approved and were valid. The tribal trial court further determined that the plans were governed by ERISA and that it had no jurisdiction over the Plaintiffs' ERISA claims. LSI appealed the tribal trial court decision to the Shakopee Mdewakanton Court of Appeals.

The tribal court of appeals reversed the tribal trial court, ruling that the plans were never formally adopted under the corporate laws of the Tribe. Because the plans would increase officer compensation, the LSI Articles of

Incorporation[1] required that the plans be formally adopted by the LSI board of directors to become effective. As the plans were never adopted by the board, no plans were created. Finding that nonexistent plans cannot impose liability on LSI under either ERISA or tribal law, the tribal court of appeals dismissed the Plaintiffs' claims.

The Plaintiffs then filed the instant action against LSI, alleging that the plans had been adopted by the LSI board of directors (and therefore "existed") and that the plans were governed by ERISA. LSI filed a motion to dismiss on three alternative grounds: (1) that LSI possesses tribal sovereign immunity from suit, which LSI did not waive; (2) that the federal court must defer to the tribal appeals court's determination that no ERISA plans were created; and (3) that the federal court lacks subject matter jurisdiction because ERISA does not apply to LSI. The District Court rejected each of these arguments and denied LSI's motion to dismiss. This appeal, in which LSI essentially makes the same arguments in support of reversing the District Court's denial of dismissal, followed.

The denial of a motion to dismiss is not generally a final order subject to immediate appeal. *See* 28 U.S.C. § 1291 (2000). In this case, however, we have jurisdiction under the collateral order doctrine, which permits an interlocutory appeal from a district court's denial of sovereign immunity. *See Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716 (8th Cir. 1989) (ruling that "a rejection

[1] The LSI Articles of Incorporation are incorporated into the Shakopee Mdewakanton Sioux Community Amended Corporation Ordinance.

of a claim for absolute or qualified immunity is immediately appealable"); *see also Osage Tribal Council v. Department of Labor,* 187 F.3d 1174, 1179 (10th Cir. 1999) (ruling that "the denial of tribal immunity is an immediately appealable collateral order"), *cert. denied,* 530 U.S. 1229 (2000); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 63 F.3d 1030, 1050 (11th Cir. 1995) (ruling that the collateral order doctrine applies to denial of tribal sovereign immunity). In addition, we have pendent appellate jurisdiction to decide "closely related" issues of law, i.e., claims that are "inextricably intertwined with" or "necessary to ensure meaningful review of" the sovereign immunity issue. *Kincade v. City of Blue Springs, Missouri,* 64 F.3d 389, 394 (8th Cir. 1995) (internal quotations and citations omitted), *cert. denied,* 517 U.S. 1166 (1996).

Our jurisdiction to address LSI's sovereign immunity claim is without doubt. We also conclude that we have jurisdiction to address LSI's assertion that the District Court erred in not deferring to the tribal appeals court's determination that no benefit plans were created. This argument is "inextricably intertwined with" the issue of whether LSI waived sovereign immunity through language in the draft benefit plans, as asserted by Plaintiffs Riverso and Johnson. If the draft benefit plans were never approved, it follows that LSI did not waive sovereign immunity in the plans. Thus, it is necessary for us to address LSI's argument that the tribal appeals court's order was entitled to deference before we can determine whether there is a need to review the sovereign immunity issue.[2] Because we agree with LSI that the District Court

[2] This ruling, while based on the pendent appellate jurisdiction standards set forth in *Kincade,* is consistent with our pre-*Kincade* cases

(Continued on following page)

erred in not deferring to the tribal appeals court's determination that no benefit plans were created, we need not address LSI's assertion that LSI is immune from suit nor LSI's remaining assertions on appeal.

We review a district court's decision to deny or grant a motion to dismiss under a de novo standard of review. *See Harris v. Epoch Group,* 357 F.3d 822, 824-25 (8th Cir. 2004).

The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856 (1985); *see also Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1986) (citing cases). Consistent with this policy, the Supreme Court has determined that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual,* 480 U.S. at 16. Thus, in this Circuit, we "defer to the tribal

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holding that questions of law which will dispose of the necessity to address an assertion of immunity are "closely related issues of law" that are properly before the Court on interlocutory appeal. *See Moreno,* 877 F.2d at 716-17 ("Resolution of the constitutional claim and the common-law tort claims will dispose of the immunity questions, and we may therefore address them."); *Drake v. Scott,* 812 F.2d 395, 398-99 (8th Cir. 1987) (holding that the claim that the plaintiff owned no property interest was subject to pendent appellate jurisdiction because, if true, "the question of qualified immunity would drop out of the case [and] would never have to be reached"), *cert. denied,* 484 U.S. 965 (1987).

Moreover, this ruling is supported by the law governing immunity claims in the analogous context of civil rights actions filed against government officials. The Supreme Court has ruled that courts must consider the "threshold question" of whether the official violated a constitutional right before addressing the issue of qualified immunity. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

courts' interpretation" of tribal law. *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court's decision that the tribal constitution gave the tribal court personal jurisdiction over non-Indians), *cert. denied,* 512 U.S. 1236 (1994); *see also Duncan Energy v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir. 1994) ("The Tribal Court's determinations of federal law should be reviewed *de novo* while determinations of Tribal law should be accorded more deference."), *cert. denied,* 513 U.S. 1103 (1995). Similarly, a tribal court's findings of fact are reviewed under a "deferential, clearly erroneous standard." *Duncan Energy,* 27 F.3d at 1300. It is only when the tribal court applies federal law that the tribal court's determinations are accorded no deference and are reviewed by the district court de novo.[3] *Id.*

The Plaintiffs argued, and the District Court agreed, that the legal status of the draft benefit plans is governed by federal law. The District Court thus accorded no deference to the decision of the tribal appeals court and instead applied a de novo standard of review. The District Court determined that the tribal court erred in concluding that no plans existed under which LSI could be subject to ERISA liability. In reaching the conclusion that the legal status of the plans is a question of federal law subject to de novo review, the District Court relied on our decision in *Kulinski v. Medtronic Bio-Medicus, Inc.,* 21 F.3d 254, 256

[3] Although a federal court may also perform a de novo review of a tribal court's determination of its own jurisdiction, *Duncan Energy,* 27 F.3d at 1300, the District Court here explicitly recognized that "the tribal court had jurisdiction to consider the *status vel non* of the ERISA plans." *Prescott v. Little Six, Inc.,* 284 F. Supp. 2d 1224, 1228 (D. Minn. 2003).

(8th Cir. 1994). *See Prescott v. Little Six, Inc.*, 284 F. Supp. 2d at 1229. The District Court's application of *Kulinski* was erroneous.

In *Kulinski,* the issue of whether or not an employer entered into an agreement obligating the employer to pay compensation benefits was not before the court on appeal. It is true that Kulinski's employer argued in the district court that an agreement entitling Kulinski to compensation benefits was invalid because it was not approved by the employer's board of directors (an argument that the district court rejected). *See Kulinski,* 21 F.3d at 255-56. On appeal, however, this Court did not address the validity and existence of the benefits agreement, but only whether the district court properly deemed the agreement an ERISA "plan." *Id.* at 258. It was this second issue of whether or not a valid agreement for benefits compensation is a "plan" subject to ERISA to which this Court applied federal law. After discussing caselaw from our sister circuits, we ruled that an ERISA "plan" only exists if the benefits arrangement requires the establishment of a separate, ongoing administrative scheme to administer the promised benefits. *Id.* at 257-58.

In this action, of course, the courts were not required to reach this subsequent issue of whether a valid benefits arrangement became a "plan" subject to ERISA. Rather, the initial, and dispositive, issue addressed was whether a valid and enforceable benefits arrangement existed. The tribal appeals court properly determined that the legal status of the LSI draft benefit plans was a matter governed by tribal law. LSI is a branch of the sovereign tribal government, created under Article V of the Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota. As such, LSI is subject to the Tribe's laws governing

corporations as set out in the Shakopee Mdewakanton Sioux Community Amended Corporation Ordinance ("Corporation Ordinance"). The Corporation Ordinance permits tribal corporations to delineate operating rules in Articles of Incorporation. Corporation Ordinance, § 4.012. As recognized by the tribal appeals court, LSI's Articles of Incorporation specifically address the manner in which officer compensation may be fixed. Restated Articles of Incorporation of Little Six, Inc., § 8.6.

Interpreting these tribal laws, the tribal appeals court determined that benefit plans that have the effect of increasing LSI officer compensation must be adopted by the LSI board of directors. *In re: Trust Under Little Six, Inc. Retirement Plans,* No. 024-00, *6 (SMS(D)C Ct. App. Oct. 26, 2001). As discussed above, we must defer to this interpretation of tribal law. Turning to the facts of the case, the tribal appeals court then found that "there is no evidence in the record that the LSI Board adopted these plans or the trust in conformance with Community law." *Id.* at *5. To the contrary, in early 1995, the new LSI board of directors "passed a resolution . . . specifically stating that it had never adopted or approved any of the benefit plans involved in this dispute." *Id.* at *4. Accordingly, the tribal appeals court found that benefit plans were never created and thus ERISA liability could not arise. After reviewing the record before us, we cannot say that the tribal appeals court committed clear error in making these findings. We therefore defer to the tribal appeals court's determination that, as a matter of tribal law, no benefit arrangement was created.

Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply. For the reasons stated, we reverse the order of the District

Court and remand the case with instructions that it be dismissed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 02-4741 (DSD/SRN)

Leonard Prescott,
F. William Johnson,
and Peter Riverso,

Plaintiffs,

v. **ORDER**

LITTLE SIX, INC., in its capacity as plan administrator for the Little Six, Inc. Executive 457 Plan, the Little Six, Inc. Supplemental Retirement Plan, the Little Six, Inc. Life Insurance Plan, the Little Six, Inc. Separation Pay Plan and the Little Six, Inc. Retention Plan; the Little Six, Inc. Executive 457 Plan; the Little Six, Inc. Supplemental Retirement Plan; the Little Six, Inc. Life Insurance Plan; the Little Six, Inc. Separation Pay Plan; and the Little Six, Inc. Retention Plan,

Defendants.

Douglas A. Kelley, Esq., Steven E. Wolter, Esq. and Kelley Law Office, 2530 Centre Village Offices, 431 South Seventh Street, Minneapolis, MN 55415, counsel for plaintiffs.

Steven F. Olson, Esq. and BlueDog, Olson & Small, 5001 80th Street West, Suite 500, Bloomington, MN 55437, counsel for defendants.

This matter is before the court upon defendants' objections to the report and recommendation of United

States Magistrate Judge Susan R. Nelson, dated August 4, 2003. Defendants object to the report and recommendation on three grounds: (1) that the court lacks subject matter jurisdiction over plaintiffs' claims because the Employee Retirement Income Security Act of 1974 ("ERISA") does not apply to defendants, (2) that the court must defer to the determination of the Shakopee Mdewakanton Sioux (Dakota) Community Court that no ERISA plan exists, and (3) that defendants possess tribal sovereign immunity which has not been waived. After *de novo* review, the court adopts the magistrate judge's report and recommendation in part.

A. Application of ERISA to Little Six, Inc. ("LSI")

The court agrees with the magistrate judge's determination that ERISA applies to defendants. As the magistrate judge correctly explained, LSI is subject to ERISA unless an exception to the *Tuscarora* rule applies. *See Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99 (1960); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.,* 986 F.2d 246, 248 (8th Cir. 1993). After due consideration, the magistrate judge determined that no exception to the *Tuscarora* rule applies. (R & R at 17.)

Defendants argue that the *Tuscarora* rule does not apply because LSI engages in "governmental activity." (Defs.' Obj. at 3.) Defendants' argument is, at first, puzzling because there exists no blanket exception to the *Tuscarora* rule for tribal entities that engage in governmental activity. Defendants apparently intend their discussion of "governmental activity" to serve as shorthand for the proposition that, in this circuit, "areas traditionally left to tribal self-government," such as matters

which are "strictly internal," "have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." *Fond du Lac,* 986 F.2d at 248.

Thus construed, defendants' argument fails. *Fond du Lac* involved an age discrimination claim brought by a tribal member against a tribal entity. 986 F.2d at 249. The case recognizes that federal courts should not intrude into disputes that are wholly internal to the tribe. *See id.* at 249. For the reasons stated in her report and recommendation, Magistrate Judge Nelson correctly concluded that LSI's alleged conduct has extramural effects and that defendants have otherwise failed to show how application of ERISA to the facts of this case would affect the Community's inherent right of self-government. Further, as a matter of common sense, it is unlikely that the "culture and traditions" of the Dakota nation have as much to say on the subject of employee benefit plans, an innovation of the last century, as they would regarding the appropriate age for a tribal member to retire from work. *See id.* at 249. Defendants' objection therefore fails.[1]

---

[1] Defendants complain that the magistrate judge dismissed in a single footnote their argument that Opinion Letter 81-3 of the Pension Benefit Guaranty Corporation ("PBGC"), issued March 4, 1981, compels the conclusion that ERISA does not apply to LSI. Defendants argued before Magistrate Judge Nelson that PBGC opinion letters are entitled to *Chevron* deference (Defs.' Mem. in Supp. of Mot. to Dismiss at 8). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984) (where statute is silent or ambiguous, agency interpretation controls if "permissible").

PBGC disagrees. In Opinion Letter 87-7, issued three years after *Chevron* was decided, PBGC acknowledges that its opinion letters "are not binding on the public or on the courts" and that they are, in any event, entitled only to *Skidmore* deference. Priv. Ltr. Rul. 87-7 (Pension

(Continued on following page)

B. *Status vel non* of the ERISA plans

Defendants next object that this court must defer to the ruling of the Court of Appeals for the Shakopee Mdewakanton Sioux Community that no ERISA plans exist. The magistrate judge correctly determined that, because tribal court jurisdiction is a matter of federal law, a federal district court has subject matter jurisdiction to review whether a tribal court's exercise of its jurisdiction was proper. *See Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994). The magistrate judge also rightly concluded that the question of the tribal court's jurisdiction, as well as other questions of federal law decided by the tribal court, are reviewed by the district court *de novo. See id.* at 1300. However, the magistrate judge stopped short of determining whether the tribal court was correct in its conclusion that no ERISA plan was formed, deciding it would be inappropriate to decide that question without the benefit of the full record before the tribal court. After *de novo* review, the court respectfully disagrees with the magistrate judge's conclusion, and holds, for reasons set forth below, that it is proper to dispose of the question of the *status vel non* of the ERISA plans at this time.

Benefit Guar. Corp. Jul. 21, 1987) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (weight of agency authority "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control")). Even were this not so, the extramural effects cited by the magistrate judge are more than sufficient to remove this case from the factual situation presented in Opinion Letter 81-3. *See* Priv. Ltr. Rul. 81-3 (Pension Benefit Guar. Corp. Mar. 4, 1981).

A review of the procedural history of this matter is in order. Plaintiffs first brought their ERISA claims before this court in the mid-1990s. That round of federal litigation was terminated when Judge Kyle ordered the case dismissed under the doctrine of exhaustion of tribal remedies. *See Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995). Judge Kyle assumed, but did not decide, that the Mdewakanton Sioux tribal courts had jurisdiction to consider whether the ERISA plans under which plaintiffs claimed relief existed. *See id.* at 1224 ("The tribal court presumptively has jurisdiction to determine whether LSI's plans are valid ERISA plans."); *see also Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1269 (8th Cir. 1995) ("ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA *status vel non* of a plan"), *quoted in Prescott*, 897 F. Supp. at 1222.

Plaintiffs did as directed by Judge Kyle and brought their dispute before the court of the Shakopee Mdewakanton Sioux Community. (Compl. Ex. 6.) After a hearing, that court reached several conclusions. First, the court implicitly determined that it did have jurisdiction to determine whether the putative plans exist. (Compl. Ex. 6.) Second, the court found that the plans exist. (Compl. Ex. 6 at 5-6.) Third, the court held that the plans were governed by ERISA and that, therefore, the court was deprived of jurisdiction to continue the matter further. (Compl. Ex. 6 at 6.)

Defendants then took their appeal to the Court of Appeals for the Shakopee Mdewakanton Sioux Community. (Compl. Ex. 7.) That court reversed and held that, as a matter of tribal corporate law, the plans could not exist without evidence that they had been formally approved by LSI's board of directors in conformance with LSI's articles

of incorporation. (Compl. Ex. 7 at 6-8.) Apparently, no further appeal was available to the plaintiffs under the laws of the Community. Plaintiffs, having thus exhausted their tribal remedies, now return to federal court to seek review of the tribal court's rulings.

Once tribal remedies have been exhausted, the first question for the district court is whether the tribal court's exercise of its jurisdiction was proper. *See Duncan Energy,* 27 F.3d at 1300. Accordingly, after *de novo* review, the court affirms that which Judge Kyle presumed and the tribal court held: the tribal court had jurisdiction to consider the *status vel non* of the ERISA plans. "Although federal courts have exclusive jurisdiction to award equitable relief under 29 U.S.C. § 1132(a)(3), federal courts do not have exclusive jurisdiction to determine whether an ERISA plan exists." *Prescott,* 897 F. Supp. at 1222. To date, Congress has displayed no intent to remove that question from tribal jurisdiction, and, "because the tribe retains all inherent attributes of sovereignty that have not been divested by the federal government, the proper inference from silence is that the sovereign power remains intact." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987).

Defendants, recognizing that our jurisdiction over this matter evaporates once the plans are deemed not to exist for purposes of ERISA, would end the inquiry there. Defendants quote *Iowa Mutual* for the proposition that, "[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . , proper deference to the Tribal Court system precludes relitigation of issues raised in the Tribal Court." (Defs.' Obj. at 2.)

Defendants are partially correct. As the Eighth Circuit Court of Appeals explained in *Duncan Energy,*

Iowa Mutual requires that federal courts review tribal courts' findings of fact "under a deferential, clearly erroneous standard." *Duncan Energy,* 27 F.3d at 1300. Likewise, the federal court must also accord deference to determinations of tribal law. *See id.* at 1300. A tribal court's determinations of federal law, however, are accorded no deference and are reviewed by the district court *de novo. See id.* at 1300.

As correctly observed by the magistrate judge, the question of the *status vel non* of an ERISA plan is a mixed question of law and fact in this circuit. *Kulinski v. Medtronic Bio-Medicus, Inc.,* 21 F.3d 254, 256 (8th Cir. 1994). The law which is to be applied to the question is federal law. *See id.* at 256-57. The appropriate standard is supplied by the ERISA statute interpreted in accordance with relevant precedent of the Supreme Court of the United States and this circuit. *See id.* at 256-57.

Having determined that the question of the *status vel non* of the ERISA plans is reviewable because it involves application of federal law, the court must determine whether it is appropriate to conduct that review at this stage of the litigation. The question of the existence of the plans under ERISA merges with the question of the court's jurisdiction over the subject matter of this action. *See Kulinski,* 21 F.3d at 256. If there is insufficient evidence to establish the existence of at least one plan, the court must dismiss the case. *See id.* at 256.

"[B]ecause jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial. . . . " *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). The only exception to this principle is triggered when "the jurisdictional

issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve that issue.'" *Id.* at 730 (quoting *Crawford v. United States,* 796 F.2d 924 (7th Cir. 1986)). The magistrate judge was of the opinion that this narrow exception should apply to delay review of the tribal court's decision until the full transcript of those proceedings is before the court. (R & R at 36.) After considering what should be the appropriate scope of that review in the post-exhaustion posture of this case, however, the court respectfully disagrees.

One of the purposes of the doctrine of exhaustion of tribal remedies is to further "the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut.,* 480 U.S. at 14. Toward that end, it is incumbent upon the federal courts to show proper respect for the findings of tribal courts on matters of fact and the conclusions of those courts on questions of tribal law. *See Duncan Energy,* 27 F.3d at 1300. Plaintiffs have placed the opinions of both the tribal trial and appellate courts before this court. (Compl. Exs. 6 & 7.)

The tribal trial court conducted a three-day evidentiary hearing. (Compl. Ex. 6 at 3.) From the face of its opinion and order, it is apparent that the court credited certain evidence, did not credit other evidence, and made findings of fact regarding the reality and operation of the plans. (Compl. Ex. 6.) On review, the Court of Appeals did not challenge the validity of the trial court's factual findings. (Compl. Ex. 7.) Rather, it ruled that the trial court had erred as a matter of tribal law and that no ERISA plans existed because there was no evidence that the plans had been adopted by the LSI board in conformance with the technical requirements of LSI's articles of incorporation. (Compl. Ex. 7 at 6-8.) The court observed

that to hold that the plans existed in the absence of such formalities "would be to ignore the carefully crafted body of corporate law laid out in [the] Community's Corporation Ordinance and in LSI's Articles of Incorporation." (Compl. Ex. 7 at 6.)

In so holding, the appellate court erred as a matter of federal law. As previously discussed, the standard for the existence of an ERISA plan is supplied by federal, not tribal, law. *See Kulinski,* 21 F.3d at 256-57. "Whether an ERISA plan exists . . . may be determined by whether the employer requires 'an ongoing administrative program to meet [its] obligation.'" *Eide v. Grey Fox Technical Services Corp.,* 329 F.3d 600, 605 (8th Cir. 2003). An ongoing administrative program "is necessary when 'to determine the employees' eligibility for and level of benefits [the employer] must analyze each employee's particular circumstances in light of the appropriate criteria.'" *Id.* at 605 (quoting *Kulinski,* 21 F.3d at 257).

In this case, the tribal trial court found that LSI actually assembled such an administrative program. The court determined that the evidence showed "that until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under all five Plans." (Compl. Ex. 6 at 9.) The court also found that "[t]he evidence shows that each of the Plans included more beneficiaries than just the [plaintiffs]" and that LSI established and periodically transferred money into a trust in order to meet its continuing obligations to participants in the plans. (Compl. Ex. 6 at 9-10.) Assets from the trust were actually disbursed to satisfy claims under three of the five plans. (Compl. Ex. 6 at 10.) Finally, the court noted that the written material accompanying the plans

indicated that LSI itself believed that the plans were subject to ERISA. (Compl. Ex. 6 at 10.)

Defendants have not suggested, either before the magistrate judge or in their objections to her report and recommendation, that the findings of the tribal trial court are unsound.[2] In the absence of such a claim, sound principles of comity caution the court against re-weighing the evidence. *See Duncan Energy,* 27 F.3d at 1300 (federal court should not set aside factual findings of tribal court unless clearly erroneous). Therefore, the court finds that it would be fruitless to wait for the parties to deposit the full transcript. Applying the correct legal standard to the facts as found by the tribal court, the court holds that the each of the five plans exists and is governed by the dictates of ERISA.

C. Sovereign Immunity

The court agrees with and adopts the magistrate judge's discussion of sovereign immunity and conclusion that LSI possesses no such immunity from suit with respect to claims brought by plaintiff Prescott because Prescott is a Community member. Article 3.1 of LSI's articles of incorporation states that LSI's immunities "shall not extend to actions against [LSI] by the Community or any voting member of the Community." (Aff. of Steven F. Olson Ex. B at 1). Regardless of whether that language is construed as a waiver of sovereign immunity or a limitation of the immunities conferred upon LSI by

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[2] Indeed, defendants conceded before the tribal appellate court that "there is support in the record for at least some of the Trial Court's conclusions." (Compl. Ex. 7 at 6.)

the Community, the magistrate judge correctly observed that the result is the same.

Defendants argue that Article 3.2 restores a portion of that sovereign immunity which was waived in Article 3.1. Specifically, defendants contend that, by reiterating that "[c]onsent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of [the articles of incorporation] or the Corporation Ordinance in the Tribal Court" (Aff. of Steven F. Olson Ex. B at 2), Article 3.2 cloaks LSI with immunity from suit by the Community or its members in every forum except the tribal court.

The language of Article 3.2 will not bear defendants' construction. The purpose of Article 3.2 is to grant LSI the power to waive that immunity which was conferred upon it in Article 3.1. The Community spoke clearly and unequivocally regarding the scope of LSI's sovereign immunity in Article 3.1. If the Community had wished to leave intact LSI's sovereign immunity from suits brought by its members in federal court, it could have amended Article 3.1 by inserting the words "in tribal court" between the words "actions" and "against," or by dealing separately with LSI's immunities as against individual members and LSI's immunities as against the community as a whole. For whatever reason, the community chose against limiting its members' litigation options. Therefore, the court holds that sovereign immunity provides defendants no defense with respect to plaintiff Prescott's claims.

Because the magistrate judge did not reach the question of the existence of the ERISA plans in her report and recommendation, she did not fully address the question whether defendants waived their immunity from suit

in summary plan descriptions ("SPDs") which, as the tribal court found, LSI distributed to participants in the plans. (Compl. Ex. 6 at 10.) The magistrate judge did observe, however, "striking language" in some of the SPDs that weighed in favor of a finding of waiver. (R & R at 35.)

Defendants argue that the SPDs "are not legally operative documents" and therefore could not waive LSI's sovereign immunity. (Defs.' Obj. at 8.) That contention has no merit. "Recognizing that employee benefit plans are usually lengthy and highly technical documents, Congress required plan administrators to furnish SPDs to each plan participant and beneficiary." *Jensen v. SIPCO, Inc.,* 38 F.3d 945, 952 (8th Cir. 1994); *see also* 29 U.S.C. § 1022(a). SPDs therefore facilitate "adequate disclosure to employees," which is "one of ERISA's major purposes." *Jensen,* 38 F.3d at 952. "Because of the importance of disclosure to [ERISA's] statutory regime," courts apply a rule of construction to SPDs under which "an SPD provision prevails if it conflicts with a provision of a plan." *Id.* at 952. It is, therefore, quite possible that language contained in an SPD could operate to effect a waiver of LSI's sovereign immunity.

In order for a waiver of tribal sovereign immunity to be effective, it must be clear and unequivocal. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). As the magistrate judge rightly observed, however, waiver does not require "the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota,* 50 F.3d 560, 563 (8th Cir. 1995). With those principles in mind, the court examines the language of the SPDs. Three of the SPDs, those applicable to the LSI Life Insurance Plan, the

LSI Separation Pay Plan and the LSI Supplemental Retirement Plan, each contain the following statements:

1. "[I]f you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court." (Compl. Ex. 1 at 3; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

2. "If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court." (Compl. Ex. 1 at 3; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

3. "If it should happen that plan fiduciaries misuse the Plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court." (Compl. Ex. 1 at 4; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

The phrase "you may file suit in a federal court" leaves little open for interpretation. It is clear, it is unequivocal, and it has legal effect. Therefore, the court holds that LSI has waived its sovereign immunity with respect to the LSI Life Insurance Plan, the LSI Separation Pay Plan and the LSI Supplemental Retirement Plan as to the claims of all plaintiffs.

Waiver, however, may not be implied. *Santa Clara Pueblo,* 436 U.S. at 58; *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998). With respect to the LSI Retention Plan and the LSI Executive 457 Plan, plaintiffs have not cited, nor can the court find, any language in the SPDs that could be construed as a waiver of LSI's sovereign immunity. (Compl. Exs. 4 & 5.) The court therefore holds that LSI is immune from those

claims of plaintiffs Johnson and Riverso which arise under the LSI Retention Plan or the LSI Executive 457 Plan.

Accordingly, after conducting a *de novo* review of the file and record, the court adopts those parts of the magistrate judge's report and recommendation that are consistent with this order.

Therefore, **IT IS HEREBY ORDERED** that:

1. Defendants' motion to dismiss [Docket No. 2] is granted with respect to the claims of plaintiffs F. William Johnson and Peter Riverso against defendants Little Six, Inc., Retention Plan and Little Six, Inc., Executive 457 Plan.

2. Defendants' motion to dismiss is granted with respect to the claims of plaintiffs Johnson and Riverso against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Retention Plan and in its capacity as plan administrator for the Little Six, Inc., Executive 457 Plan.

3. Defendants' motion to dismiss is denied with respect to all claims of plaintiff Leonard Prescott.

4. Defendants' motion to dismiss is denied with respect to the claims of plaintiffs Johnson and Riverso against defendants Little Six, Inc., Life Insurance Plan, Little Six, Inc., Separation Pay Plan and Little Six, Inc., Supplemental Retirement Plan.

5. Defendants' motion to dismiss is denied with respect to the claims of plaintiffs Johnson and Riverso against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Life Insurance Plan, in its capacity as plan administrator for the Little Six,

Inc., Separation Pay Plan and in its capacity as plan administrator for the Little Six, Inc., Supplemental Retirement Plan.

Dated: September 30, 2003

/s/ David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3702

Leonard F. Prescott, et al.,	*	
	*	
Appellees,	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Little Six, Inc., et al.,	*	
	*	
Appellants.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 8, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
APR 5 - 2005
OFFICE OF THE CLERK

No. 04-1197

In The

Supreme Court of the United States

LEONARD F. PRESCOTT, et al.,

Petitioners,

v.

LITTLE SIX, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case arises from conduct of senior executives of an Indian gaming enterprise, Little Six, Inc. (LSI), who during 1993 and 1994 tried to dramatically increase their compensation by diverting LSI's assets, without LSI's approval, to certain "benefit plans" which they created for themselves. Those same senior executives are the Petitioners here. Their actions were discovered, their gaming licenses were revoked, and they were terminated by LSI. They have nevertheless repeatedly attempted to use the courts to get the fruit of their unlawful acts.

To that end, in April 1995, in a case before the Court of the Shakopee Mdewakanton Sioux Community (the Community), Petitioners asserted LSI had formally adopted the five "benefit plans" which are at the heart of their case, and alleged the plans were therefore governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1053 ("ERISA").

Despite the fact that the status of the purported plans and the disposition of assets in them was pending before the Community Court, in May 1995 Petitioners brought suit in the United States District Court for the District of Minnesota, naming as defendants LSI, the purported plans, and the alleged trustees of a putative trust containing assets to fund the purported plans. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) ("*Prescott I*"). In *Prescott I*, Petitioners asserted that LSI had formally adopted the purported plans, and that the purported plans were governed by ERISA. Petitioners asserted that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans. LSI moved to dismiss the suit.

Consistent with all other Courts, the District Court held that while the federal courts have exclusive jurisdiction over many ERISA issues, non-federal courts have jurisdiction to determine the existence *vel non* of purported ERISA plans. Because the Community Court action was prior-filed, and based upon the federal Indian law doctrine requiring exhaustion of tribal remedies, the District Court dismissed. *Id.* Petitioners did not appeal.

Petitioners thereafter appeared before the Community Court in proceedings to resolve the existence *vel non* of the purported plans and the purported trust. After an evidentiary hearing, the Community Trial Court held LSI that had adopted the proposed plans, ERISA applied, and the Community Court therefore lacked jurisdiction.

LSI appealed to the Community Appellate Court, asserting the Trial Court erred because no competent evidence existed in the record that LSI's Board of Directors, which was charged with the duty and vested with exclusive authority to set officers' compensation, had ever formally considered the final draft of the proposed plans, let alone adopted them. The Community Appellate Court agreed and reversed the pivotal Trial Court findings that LSI had adopted the proposed plans. The Appellate Court then held that for the proposed plans to validly exist under Community law, formal action by LSI's Board of Directors was required because the proposed plans would increase officers' compensation. The Appellate Court held that because the plans were never adopted by LSI, and because adoption of the proposed plans by LSI was required by Community law, no benefit plans were created, and Petitioners therefore could not claim the protections of ERISA.

Upon remand, the Community Trial Court ordered the trustees to return all funds to LSI. Petitioners did not appeal that order, and the trust funds have been returned to LSI (and subsequently provided to the Community) and the trust dissolved.

Nine months after the funds were returned to LSI, Petitioners filed a second federal court suit against LSI, again asserting that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans, and requesting that the District court declare that the proposed plans were properly adopted by LSI. LSI moved to dismiss, asserting the prior tribal and federal court orders were dispositive of the issues Petitioners asserted, and asserting sovereign immunity from suit precluded an exercise of subject matter jurisdiction.

The motion to dismiss was granted in part and denied in part: the District Court dismissed Riverso and Johnson's claims under three of the proposed plans because neither the proposed plans nor ERISA contained a waiver of the Community's sovereign immunity from federal court suit. The District Court did not dismiss the remaining claims. *Prescott, et al. v. Little Six, Inc., et al.*, 284 F. Supp. 2d 1224 (D. Minn. 2003).

LSI appealed the District Court's partial denial of the motion to dismiss. The partial grant of the motion to dismiss was not appealed. In its appeal, LSI asserted that the District Court had committed three independent errors, and that correction of any one of those errors required reversal and remand for dismissal. The United States Court of Appeals for the Eighth Circuit reversed the District Court and remanded for dismissal. In its decision, the Court of Appeals found it necessary to rule on only one

of the three independent grounds for reversal. *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004).

Petitioners suggested that the Court of Appeals grant *en banc* review. Without even finding it necessary to have LSI provide a response, the Court of Appeals, without dissent, denied the suggestion for *en banc* review.

Petitioners now seek to have this Court review the Court of Appeals decision.

After the Court of Appeals issued its mandate that the District Court dismiss this matter, and for reasons wholly unrelated to the present matter, LSI ceased operations and distributed all of its remaining assets to the Community. LSI was dissolved by Community Court order on January 17, 2005, and all of its remaining assets have been distributed to the Community.

STATEMENT OF FACTS

The Shakopee Mdewakanton Sioux Community is a federally recognized Indian Tribe, 68 Fed. Reg. 68179, 68182 (Dec. 5, 2003), which possesses and exercises all inherent sovereign powers of a tribal government. *Prescott II*, Joint Appendix 144 (hereinafter Jt. App.) (Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota). LSI was an arm and instrumentality of the Community, and was the means through which the Community engaged in lawful gaming activities in compliance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). As a corporation wholly owned by the Community and created under Community laws, LSI shared the Community's sovereign powers. Jt. App. 217

(Articles of Incorporation of Little Six, Inc., Art. 3.1); Jt. App. 156a (Community Business Corporation Ordinance. § 4.11).

Petitioners are former executive officers of LSI, Jt. App. 54 (Complaint ¶¶ 7-10), who, in 1993 attempted to give themselves substantial, unauthorized increases in compensation by establishing various deferred compensation arrangements, naming themselves as beneficiaries, and contributing to their individual plan accounts substantial sums from LSI's revenues. *In re Trust Under Little Six, Inc. Retirement Plans*, 1 Shak. App. Rptr. 182, 189 (Shakopee Mdewakanton Sioux Community App. 2001) (hereinafter *In re Trust*, republished in Appendix hereto) ("here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." (emphasis in original)).

These proposed plans included a severance pay arrangement known as the "Little Six, Inc. Separation Pay Plan", Jt. App. 79, and three unfunded, non-qualified deferred compensation arrangements: the "Little Six, Inc. Supplemental Retirement Plan", Jt. App. 86; the "Little Six, Inc. Retention Plan", Jt. App. 94; and the "Little Six, Inc. Executive 457 Plan", Jt. App. 102.

None of the proposed plans were ever presented to or approved by LSI's Board of Directors, *In re Trust*, App. 2, so under Community law, none was ever validly adopted or effective. Jt. App. 232 (Article 8.6, stating "officers [of the corporation] shall receive such salary or compensation as may be fixed by the Board of Directors."); *In re Trust*. In *In re Trust*, the Tribal Appellate Court held: "Because we conclude that the trust and plans at issue were never

properly adopted by LSI under Community law, an ERISA plan was never created." *In re Trust*, App. 2. *See also id.* at 11 ("Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants").

The proposed plans were to be unfunded, and the plan documents state that benefits were to be provided out of LSI's general assets. Notwithstanding the unfunded status of the Supplemental Retirement Plan, the Retention Plan, and the Executive 457 Plan, Petitioners established a trust known as the "Trust Under Little Six, Inc. Retirement Plans", Jt. App. 298, to hold funds which Petitioners transferred from LSI, which Petitioners hoped would provide a potential source for payment of the compensation which Petitioners were seeking to provide themselves. The trust was intended to be what is commonly called a "rabbi trust".

Consistent with Petitioners' intent to establish a "rabbi trust" for their own benefit, Section 1(d) of the Trust Agreement provides:

> Plan participants and their beneficiaries shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plans and this Trust Agreement shall be mere unsecured contractual rights of Plan participants and their beneficiaries against Company [LSI]. Any assets held by the trust will be subject to the claims of the Company's general creditors. . . .

Trust Under Little Six, Inc. Retirement Plans, Jt. App. 298.

The rabbi trust was intended by those officers of LSI who created the scheme to provide a source of funds from which they could obtain their illegal gains in the unfunded, deferred compensation plans listed in Appendix A to the Trust Agreement. (*Id.*, preambles (b) and (f)). The trust arrangement also was never presented to, nor approved by, the Board of Directors of LSI. *In re Trust* at 6.

Through Resolution LSI-01-12-95-001, the Board of Directors of LSI expressly declined to adopt or approve any of the plans or the trust, and directed the return of the assets of the trust to LSI in accordance with Sections 1(b), 4, and 12(b) of the Trust Agreement. (Jt. App. 322). The Trial Court subsequently approved return of the trust assets to LSI. *In re Trust Under Little Six Retirement Plans*, Order (Shakopee Mdewakanton Sioux Trial Court Mar. 12, 2002), Jt. App. 237. The assets have been returned to LSI, and there is no longer a trust fund related to the proposed plans.

REASONS FOR DENYING THE PETITION

In this matter corrupt former officers of an Indian gaming tribal enterprise wanted to increase their compensation. They knew that, under applicable law, such increases had to be approved by the corporation's Board of Directors. Yet, they purported to establish deferred compensation plans to which they contributed gaming revenues. The Board of Directors did *not* approve the deferred compensation plans. The lack of authorization did not faze Petitioners. They simply acted as if the corporation granted the increase in compensation, and they now claim

that because they acted as if the corporation approved the increases in compensation, they can enforce those increases as *de facto* ERISA plans. The Court of Appeals for the Eighth Circuit found their argument an insufficient basis upon which to permit the petitioners to obtain their illegal and ill-gotten gains.

Petitioners now come to this Court and assert that, other than the decision below, every reported decision from State or federal courts holds that ERISA requires the enforcement of the type of unlawful diversion of corporate funds which Petitioners attempted to perpetrate upon their employer.

This case does not provide a vehicle for resolving any conflict in lower court decisions, nor does it provide a vehicle for clarifying any broad principles of ERISA law. Petitioners presented their argument to the Court of Appeals, that Court analyzed that argument, correctly discussed the applicable law, and then applied that law to the facts of this case. Petitioners do not agree with the Court of Appeals application of the law to the facts of this case, but this case is not one of the few cases which should occupy this Court's time.

I. Petitioners seek to have this Court re-determine a factual issue, but Petitioners do not present any unsettled legal issue.

A. The settled facts of this case do not present the question presented by Petitioners.

Petitioners ask this Court to grant certiorari over the following question:

> Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

The facts of this case clearly do not present that issue. The very core of the Court of Appeals decision is based upon the fact, established as *res judicata*, that there is *not* an employee benefit plan established by an Indian tribal corporation. *See, e.g.*, *Prescott II*, Pet. App. 9 ("Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply.").

Petitioners' incorrect factual assertion is based upon findings of the Community Trial Court. But those factual determinations were rejected and reversed by the Community Appellate Court. The Community Appellate Court's reversal of the Tribal Court finding, and the legal effect of that reversal, is the primary issue addressed in *In re Trust*. In *In re Trust*, the appellate Court wrote that the Community Trial Court had found that "LSI had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is *no evidence* in the record that the LSI Board adopted these plans, or the trust in conformance with Community law, we reverse." *In re Trust*, App. 6 (emphasis added)). Petitioners are merely presenting a hypothetical question, based upon the facts as Petitioners want them to be, not based upon the facts of this case. The Court should deny the request to hear the hypothetical question which Petitioners pose.

B. There is no disagreement in the lower courts on the question presented by Petitioners.

Petitioners do not assert that there is a divergence of opinions in the lower courts. In fact, Petitioners cite decisions from the Court of Appeals for the Eighth Circuit, every other United States court of appeals, and several state supreme courts which have reached the issue which their petition presents, all of which hold that federal law is used to determine the enforceability of a benefit plan which an employer has created.

Of particular significance for current purposes, the Court below clearly stated that it agreed with the very rule of law which Plaintiffs seek to present to this Court. *Prescott II* (Pet. App. 8). Judge Bowman, writing for a unanimous Court below, cited with approval and analyzed his own prior opinion in *Kulinski v. Medtronics Bio-Medicus, Inc.*, 23 F.3d 254 (8th Cir. 1994), where the Court held that *if* the employer creates a benefit plan, enforceability of the plan is governed by ERISA. *Prescott II* (Pet. App 8). But, as noted above, the Court rejected Petitioners' arguments because in the present case there was not an "employee benefit plans established by an Indian tribal corporation in favor of its employees." This Court has provided clear notice to its bar that it will rarely grant certiorari to review an alleged misapplication of a properly stated rule of law to the facts, and will rarely review factual disputes. The present falls within both of these categories, and certiorari should be denied.

II. There is no disagreement in the lower courts on the very narrow issue which is presented by the facts of this case.

The issue presented by the facts of this case is very narrow:

> whether federal courts holdings that there can be *de facto* ERISA plans requires that federal courts enforce an attempt by Indian tribal gaming executives to give themselves unauthorized pay raises.

There is not a divergence of opinion in lower courts on the issue which is presented by the facts of this case. As Petitioners themselves note, all federal courts, including the Court of Appeals for the Eighth Circuit, recognize the rule that the courts will impose *de facto* plans on employers when the facts warrant that equitable remedy. In both the Community Court and the federal courts below, Petitioners asserted that application of the *de facto* plan rule to the present case should result in a *de facto* plan in favor of petitioners. Both courts correctly rejected Petitioners' attempt to stretch the *de facto* plan rule to the facts of this case, and this Court should not use its resources to determine if the Court of Appeals misapplied the uniformly accepted *de facto* plan rule to the unique facts of this case.

A. The rule regarding *de facto* plans cannot be used to provide benefits to executive officers who, without their employer's approval, sought to establish ERISA plans for themselves.

While all lower courts have adopted the *de facto* plan rule, no court has ever enforced a *de facto* plan in favor of

executive officers who purported to create the plans for themselves, in violation of the governing corporate documents and corporate law pursuant to which the entity existed. The lack of divergence in the courts below, by itself, strongly counsels against granting certiorari.

The merits of Petitioners' attempt to apply the *de facto* plan rule to their factual context provides additional basis for denying the writ of certiorari.

Consistent with standards of corporate governance generally, LSI's executive officers have no authority to increase their compensation. Such pay raises must be approved by LSI's Board of Directors. Jt. App. 232 (LSI Articles of Incorporation, Art. 8, § 8.6).

The reasons corporate officers cannot give themselves unapproved increases in compensation are self-evident.[1]

Despite the clear Community law and LSI Articles of Incorporation on the issue, Petitioners assert that the *de facto* plan rule gives them the right to dramatically increase their own compensation merely by claiming that they had established ERISA plans for their own benefit.

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[1] Petitioners' attempts to increase their compensation prompted investigation by the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission, and served, *inter alia*, as the basis for revocation of Prescott's gaming license. *See In re Leonard Prescott*, #94-0024, Findings of Fact (Shakopee Mdewakanton Sioux Community Gaming Comm'n 1994), *aff'd, In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order*, 1 Shakopee App. Rptr. 146 (Shakopee Mdewakanton Sioux Community App. 1999). Similar conduct has recently been the focus of investigation and prosecution by federal authorities in cases involving Enron Corp., WorldCom, Inc., McKesson Corp., Arthur Anderson, Tyco International, Inc., and Global Crossing, Inc.

Petitioners cite *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*) for their claimed federal right to give themselves pay raises. *Donovan* holds that where an entity's actions cause a reasonable employee to believe that the corporation has created an ERISA plan for the benefit of the employee, courts can recognize the *de facto* existence of ERISA plans. *Id.* at 1373. The enforcement of *de facto* plans is premised on equitable principles, and relies on the same rationale as promissory estoppel:

> [T]here can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from "pulling the rug out from under" promised retirement benefits upon which his employees had relied during their long years of service.

Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1408 (2nd Cir. 1985). The lower courts have held that to accomplish ERISA's intended purpose, if an employer led its employees to believe that a benefit plan had been adopted, the employer should not then be able to deny that a plan existed. *Id.*

LSI wholly agrees with this principle, and chose to abide by it, even though not compelled to do so by federal law. As shown in this matter, where LSI's *non-executive* employees were led to believe that a plan had been established, and those employees might have relied upon that belief, LSI ratified the plans. Jt. App. 322 (LSI Resolution 01-12-95). On the other hand, where the intended beneficiaries were senior executive officers such as the Petitioners, who knew the proposed plans had never been

approved or adopted, there was not justified reliance, because those executives knew otherwise.[2]

Other than the now-vacated District Court decision below, no federal Court has ever applied the *de facto* plan analysis in favor of the very officers whose actions are alleged to have created the *de facto* plan. Despite exhaustive research, LSI has not even been able to locate any other case from any federal court, where an executive officer knew the compensation scheme he created was not properly authorized, yet attempted to claim he was misled into believing he was a participant in an approved plan. *See, e.g., Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 254 (8th Cir. 1994) (masonry contractor misled bricklayer regarding existence of a plan); *Moeller v. Bertrang*, 801 F. Supp. 291 (D.S.D. 1992) (auto shop owner established a plan but then attempted to cancel it and deprive retirement benefits to a mechanic).

LSI has previously challenged Petitioners to cite even one case which supports their *de facto* plan argument, but the closest Petitioners have been able to come is *Bennett v. Gill & Duffus*, 1987 WL 34256 (S.D.N.Y. Dec. 29, 1987). *Bennett* falls far short of the facts in this matter. In *Bennett*, the Court held that sixteen employees could pursue their claim that there was a *de facto* plan. While one of the plaintiffs in the case was an executive of a subsidiary of the corporation, the plan at issue was created by the parent corporation, and the subsidiary's executive had not

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[2] Because enforcement of *de facto* ERISA plans rest on equitable principles, equitable defenses apply. Here, Petitioners have unclean hands, for they seek ERISA's protection for their acts violating Community law and diverting gaming revenues to their personal use. Consequently, Petitioners would not be eligible for equitable remedies.

taken part in creating the alleged plan. As in all other cases finding *de facto* plans, the subsidiary's executive had been misled by his employer, the parent corporation. Petitioners cannot even point to any case which enforces a *de facto* plan in favor of any executive against the executive's own corporation, and petitioners lack any support for their assertion that the *de facto* plan should be applied to the facts of the present matter: executives who seek to both create and enforce a *de facto* plan.

In stark contrast to the cases which enforce *de facto* plans, LSI did not mislead Petitioners into believing that a plan existed. Prescott was the corporate CEO and was the *Chairman* of the Board of Directors, the very body required by Community law to have approved the proposed plans, Johnson was at every Board meeting where such matters were discussed, and Riverso participated in discussions of and was privy to all actions of the Board. Petitioners knew these proposed plans were never properly approved. They cannot now seek to have the courts create a *de facto* plan by claiming they thought there was a plan, when they clearly knew the Board had never approved the proposed plans, and that such approval was a necessary prerequisite to receiving the compensation the plans contemplated.

As the Tribal Appellate Court correctly held in the portion of its opinion which addressed Petitioners' claim that there were *de facto* plans, "here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." *In re Trust*, App. 9 (emphasis in original). The Tribal Appellate Court was correct: where Community law requires that executive officer compensation must be set by LSI's Board of Directors, ERISA does

not give those executive officers a federally enforceable right to increase their own compensation, in contravention of Community law.

B. This Court should not grant certiorari to determine the narrow issue of how the rule regarding *de facto* ERISA plans applies to tribally owned and chartered corporations which operate Indian Gaming Facilities.

Other than the federal District Court below, no federal court has ever applied the *de facto* plan rule to a gaming facility which is subject to the Indian Gaming Regulatory Act. The unique context in which the present case arises would significantly effect the analysis in this case, and the lack of case law in the lower courts, and the complete lack of any divergence in the lower courts, counsels against this Court hearing this case of first impression.

The reasons senior executive officers of an Indian gaming enterprise cannot give themselves unapproved increases in compensation are even more compelling than the reasons non-gaming executives cannot increase their own compensation. Senior executive officers of an Indian gaming enterprise are held to higher standards of conduct generally than are the senior executives of non-gaming enterprises. Because maintaining the integrity of Indian gaming requires strict compliance with all applicable laws, rules, and regulations, especially those governing access to and protection of the gaming enterprise's monetary assets, any unauthorized or improper appropriation of those assets is especially egregious. The inventory of a gaming enterprise is money, consequently employees are carefully monitored to ensure the protection of the enterprise's funds, and any unauthorized appropriation of the casino's

funds for personal purposes is strictly prohibited. *See, e.g.*, 25 U.S.C. §§ 2703(9); 2710(b)(2)(B) (requiring that tribal gaming laws limit use of gross gaming revenue to those purposes stated in the cited sections). The integrity of Indian gaming rests on the absolute integrity of those responsible for management and operation of gaming enterprises; senior executives must therefore avoid even the appearance of impropriety.

Because Congress enacted the IGRA "to provide a statutory basis for the regulations of gaming by an Indian tribe adequate to shield it from . . . corrupting influences," 25 U.S.C. § 2702(3), senior management of an Indian gaming enterprise cannot be permitted to deviate from laws, rules and regulations governing their conduct, especially those which govern how funds of an Indian gaming enterprise can be used by executives. If senior executives of a tribal gaming enterprise are permitted to ignore tribal laws governing gaming, and are allowed by the courts to unilaterally increase their compensation without obtaining approvals mandated by tribal law regulating gaming, then the integrity of Indian gaming will be the victim. Such a result defeats Congress' purpose when enacting the IGRA.

The *de facto* plan rule is a well-established equitable rule. Whether it applies to the executive officers who bring the present petition, and whether and how the Indian Gaming Regulatory Act impacts the equitable analysis of the *de facto* plan rule, are the types of fact specific issues which should not occupy this Court's time. Particularly in the present matter, where Petitioners do not even allege a divergence of opinions in the lower courts, this Court should deny the request for a writ of certiorari.

III. The holding which Petitioners seek to have this Court review is only one of several barriers to federal court judgment in this matter.

As discussed in LSI's statement of the case, LSI presented three independent arguments to the Court of Appeals, and the Court only found it necessary to rule on only one of those issues. The Court below did not reach LSI's very strong arguments that LSI has not waived its sovereign immunity from suit, nor did the Court reach the legally and factually complex arguments that ERISA does not apply to LSI. LSI's current lack of assets and its January, 2005 dissolution present additional impediments to relief.

Petitioners concede that LSI has sovereign immunity from suit, and concede that ERISA does not waive LSI's sovereign immunity. Petitioner Prescott asserts that the Community Corporation Ordinance waives the Community's immunity to Prescott's federal court suit, and LSI does not agree with Petitioners' strained interpretation of the Community statutes.[3] Petitioners also assert that language in the summary plan descriptions of the alleged *de facto* plans waives the Community's immunity. But imposition of a *de facto* plan based upon equity could not provide the express waiver of immunity, as explicitly required by Community statutory law and by this Court's prior holdings. LSI's sovereign immunity would either prevent this Court from reaching the merits of this case or would prevent the Court of Appeals from reinstating the District Court order even if Petitioners were to prevail in

[3] Whether the purported waiver in the Corporation Ordinance has any remaining effect, now that the corporation has been liquidated and dissolved appears to be an unsettled question of Community law.

this Court. LSI's arguments regarding the applicability of ERISA to a gaming entity which provides the sole income to an Indian Tribe provides further substantial impediment to Petitioners' attempt to retain relief. Combined, LSI's arguments on the merits of the present case, its arguments regarding sovereign immunity, and its arguments regarding the applicability of ERISA make it extremely unlikely that Petitioners would prevail even if this Court were to grant certiorari.

CONCLUSION

Granting the writ of certiorari would not develop the law, would not resolve any divergence of opinions in the lower courts, and would not address other legal bars to petitioners' claims. It would merely reaffirm that the Court of Appeals correctly applied the existing legal rules to the unique and limited facts of Petitioners' attempt to give themselves increases in compensation. For all of the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 5, 2005

IN THE COURT OF APPEALS FOR THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plans Robert Burns, John Somers, Plaintiff-Interpleaders, v. Little Six, Inc., Defendant-Intervenor, v. Leonard Prescott, F. William Johnson, and Peter Riverso, Defendant-Intervenors.	Ct. App. No. 024-00

MEMORANDUM OPINION AND ORDER

(Filed Oct. 26, 2001)

INTRODUCTION

In this appeal, we must decide if the Court has subject matter jurisdiction over a dispute involving a trust funded to support employee benefit programs at Little Six, Inc. Plaintiffs are trustees of the trust, and Defendant-Intervenor Little Six, Inc. (LSI) and Defendant-Intervenor Prescott, Johnson, and Riverso (the Claimants) hold conflicting claims to the trust assets. The Claimants assert that the trust and associated benefit plans were properly

created under Community law and that they are each due benefits under the plans. LSI claims the trust and the plans were not validly created and that the trust is revocable and its funds should be returned to LSI. The trustees of the trust filed a petition, and then an Interpleader Complaint, seeking this Court's guidance about how they should proceed in the face of these conflicting claims. The Interpleader Complaint also requests other relief not necessarily associated with the dispute between LSI and the Claimaints, namely for this Court to approve the trustees' accounting of the trust funds and to approve other actions undertaken by the trustees.

The Trial Court first addressed whether it had jurisdiction to hear this matter. After briefing and an evidentiary hearing, the Trial Court concluded that the benefit plans and trust were properly created under Community law, and that these plans are governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500. The Trial Court then held that under ERISA, this Court lacks subject matter jurisdiction over this dispute, and the Interpleader Complaint was therefore dismissed.

On appeal, LSI argues the Trial Court erred. Specifically, LSI argues that ERISA does not apply to Tribes, and that even if it did the trust and plans at issue here are not subject to ERISA. LSI urges this Court to accept jurisdiction over this dispute and order that the trust funds be returned to LSI.

Because we conclude that the trust and plans at issue here were never properly adopted by LSI under Community law, an ERISA plan was never created, and this Court may entertain this dispute. Since the trust document

signed by Prescott and Johnson provides that the trust will remain revocable in the absence of LSI Board approval, we conclude that the trustees may return the trust funds to LSI without fear of liability. We therefore dismiss the claims presented by the Claimants, and remand for the Trial Court to entertain the other requests for relief from the trustees.

FACTUAL BACKGROUND

LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community (the Community) and it is wholly owned by the Community. *See* Article of Incorporation of Little Six, Inc. § 4. Leonard Prescott, William Johnson, and Peter Riverso served as officers, directors and/or managers of LSI from its inception in 1991 until late 1994-early 1995. It was during this time period that the benefit plans and trust at issue in this suit came into being.

We agree with the Trial Court that this dispute involves five different plans and a related trust. The evidence shows that from 1992 until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under at least five different benefit plans. *See, e.g, In re Trust under LSI Retirement Plans*, No. 055-95 (SMS(D)C Tr. Ct. March 29, 2000) at 9; LSI Trial Ex. 19-21, 54; Claimants' Trial Ex. 1039-1047, 1094-95,1101, 1105-06, 1115-1119. The five plans are:

– The LSI Life Insurance Plan

– The LSI Executive 457 Plan (457 Plan)

– The LSI Separation Pay Plan

– The LSI Supplemental Retirement Plan (SERP)

– The Retention Plan (sometimes referred to as SERP II)

These plans included more beneficiaries than just Prescott, Johnson, and Riverso. *See e.g.*, Original Trust Petition.

In the hearing below, Prescott, Johnson, and Riverso presented evidence that the plans were created as a bona fide effort to retain qualified high level employees, particularly in light of the restrictions placed on the ability of a tribal corporation to offer standard employee benefit programs, such as stock options or 401K plans. Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 632, 247, 732. LSI, on the other hand, argued that these plans were initiated and executed by Prescott and Johnson in an attempt to covertly compensate themselves with little scrutiny from others within LSI or the Community. *See* Appellant LSI's Reply Brief, at 6-7; Post Hearing Brief of LSI at 4-5.

To secure funding for at least some of these plans, a trust was established. LSI Trial Ex. 5. On March 25, 1993, on behalf of LSI, Prescott and Johnson signed a trust instrument naming Burns and Somers as trustees. LSI Ex. 5. Section (d) of the preamble to the trust document makes it clear that the parties to the trust contemplated that it would be associated with the employee benefit plans involved in this case. *Id.* In addition, the trust instrument states that the trust will only become irrevocable if it is approved by the LSI Board of Directors. LSI Ex. 5 at 1(b).

Prescott, Johnson, and Riverso all left LSI by early 1995. By that time, a new Board of Directors had been

slated and the new Board passed a resolution on January 14, 1995 specifically stating that it had never adopted or approved any of the benefit plans involved in this dispute. LSI Trial Ex. 26. The Board also noted it had never formally adopted the trust used to secure funding for these plans, and the Board specifically directed the trustees to return the trust funds to the Community. LSI Trial Ex. 26. This resolution did acknowledge that LSI had incurred liabilities under the 457 Plan and SERP I for the period between 1/1/93 and 12/31/94, and that LSI would authorize payments for these periods under the terms of the plans. *Id.* However, the resolution stated that no additional amounts would be credited to participants in these plans after December 31, 1994. *Id.* The resolution also unilaterally terminated the Life Insurance Plan. *Id.*

Since the request from LSI to return the trust assets conflicted with the actions of the trustees to date, and since the trustees were aware that the beneficiaries held conflicting claims to the trust funds, the trustees filed a petition in this Court for an order approving their actions, and requesting guidance on how to proceed in the future.

Almost contemporaneously, Prescott and Johnson filed a complaint in federal district court alleging that the trust and benefit plans were subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1500, and that under that federal statute they were entitled to relief. The United States District Court did not rule on the merits of Prescott and Johnson's claims, but instead ruled that they must first exhaust their tribal remedies before proceeding in federal court. *Prescott v. Little Six*, 897 F.Supp. 1217 (D. Minn. 1995). Specifically, the District Court concluded that this Court should have the first opportunity to determine if it had jurisdiction to

consider Prescott and Johnson's claims, and it dismissed Prescott and Johnson's claims pending exhaustion of tribal court remedies. *Id.* at 1224.

In an order dated June 19, 1999, the Trial Court allowed Prescott and Johnson to intervene in this action. The Trial Court also denied Prescott and Johnson's motion to dismiss on various grounds, and ordered the trustees to restyle their petition as a Interpleader Complaint under Rule 18 of the SMS(D)C Rules of Civil Procedure. To address the remaining question of subject matter jurisdiction, the Trial Court ordered an evidentiary hearing to be held on whether the trust supporting the benefit plans was approved by LSI or the Community. The Trial Court framed the issue in the following manner: if the trust and benefit plans were properly formed under Community law, it seemed the ERISA would apply and the federal courts would have exclusive jurisdiction; if the trust and benefit plans were not properly formed, Community law provided the Court with a jurisdictional basis to address the claims of the parties.

At the hearing, ten witnesses testified over the course of three days, and the parties have submitted numerous tangible exhibits and documents. After the hearing, the parties submitted briefs. The Trial Court concluded that although there was no evidence that the LSI Board ever formally adopted the trust and the plans, there was sufficient evidence of other actions by LSI to find that its had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is no evidence in the record that the LSI Board adopted these plans or the trust in conformance with Community law, we reverse.

LEGAL DISCUSSION

In their Interpleader Complaint the trustees have asked for an order approving their actions to date, and giving them guidance on how to resolve the conflicting claims to the trust. We agree with the Trial Court that the best way to analyze the issues presented by the trustees' request is begin by determining whether an ERISA plan exists.

Since we conclude that an ERISA plan was not formed as to these particular Claimants, we need not address whether ERISA applies to Indian tribes. We note, however, that our research to date, and the argument of each party, has not identified one case in any jurisdiction that exempts Indian tribes from ERISA's broad reach.[1]

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[1] Curiously, LSI urges us to follow the reasoning of an Eighth Circuit case not dealing with ERISA, rather than the Seventh or Ninth Circuit cases relied on by the Trial Court, both of which directly address the applicability of ERISA to Indian tribes. Opening Brief of Appellant LSI, at 8-16. In arguing that this Court should stay away from the Seventh and Ninth Circuit cases that hurts its argument, LSI states "where the legal principle upon which the jurisdiction of this Court is predicated have been subject to a decision of the 8th Circuit (as the circuit in which this Court is located), that decision would be considered to control the reach of this Court's jurisdiction." Opening Brief of Appellant LSI. While we do not reach the applicability of ERISA in this case, we do want to be clear on one point. Contrary to LSI's argument, nothing in the Community's Constitution, the jurisdictional ordinances of this Court, the SMS(D)C Court Rules, or this Court's common law, delegate jurisdictional questions, or the resolution of any factual or legal issues, to the determination of the Eighth Circuit, or the courts of any other sovereign. While we have consistently encouraged litigants to refer us to authority from other jurisdictions for guidance in resolving novel legal issues, there is nothing in this Community's law that makes the decisions of any other jurisdiction binding on this Court.

An ERISA plan does not exist as to these Claimants because, the trust and benefit plans were not properly adopted by LSI. LSI argues that there is no evidence in the record that LSI formally approved these plans or the trust, that the LSI Board could not have approved these plans and trust without a conflict of interest, and LSI maintains that Prescott and Johnson did not have the authority to enter into the trust agreement because § 8.6 of the LSI Articles of Incorporation reserves the right to set officer compensation exclusively to the LSI Board of Directors.[2] *See* Opening Brief of Appellant LSI, at 23-24; Reply Brief of Appellant LSI, at 2-7; LSI Post Hearing Brief at 17.

Indeed, there is no evidence in the record that the LSI Board ever expressly approved the trust or the associated plans. In fact, there is evidence that suggests that at least some of the former LSI Board members do not ever recall approving or discussing the trust or plans. *See, e.g.*, Transcript of 10/5/99-10/7/99 Hearing (Tr.) at 33-38, 369-370. We also note that we have not been able to find any reference to the trust in any of the minutes or notes from LSI Board meetings in the record below (although there are some ambiguous references to some of the plans in question here).

To be fair, this is hardly an easy case. LSI concedes in its brief that there is support in the record for at least some of the Trial Court's conclusions. For example, LSI does not argue on appeal that these plans and the trust

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[2] Section 8.6 of the LSI Articles of Incorporation states, "The officers [of LSI] shall receive such salary or compensation as may be fixed by the Board of Directors." LSI Ex. 4.

never existed in some form, or that there were no references in various corporate records to some of the plans. *See* Appellant's Little Six, Inc.'s Opening Brief, at 26. And we certainly do not dispute the Trial Court's conclusion that the time period in question was a turbulent one in which records may have been lost or never created. However, at the end of the day, we simply cannot impute to LSI liability on these plans without some evidence that LSI formally intended to adopt or approve the trust or plan documents in accordance with its Articles of Incorporation. To do so would be to ignore the carefully crafted body of corporate law laid out in this Community's Corporation Ordinance and in LSI's Articles of Incorporation.

Claimants argue that formal approval of the trust and plans is not required. They cite to federal ERISA cases that show that federal courts generally look to the totality of the circumstances when deciding if an ERISA plan exists. *See, e.g., Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). We understand these cases to be based on the principle that an employer should not be able to entice employees with promises of future benefits, and then later claim the benefit plans were ineffective because of a formalistic technicality. *See generally Donovan*, 688 F.2d at 1370; *Bennett v. Gill & Duffus Co.*, 1987 U.S. Dist. Lexis 12037, at 12-14; 29 U.S.C. § 1001 (purpose of ERISA is to protect employees and their dependents). However, we agree with LSI that the facts in this case are different than those federal cases. Here, the Claimant's reliance was not induced by their employer – instead, it was the Claimants *themselves* who sought to establish these plans for *themselves*. For example, in *Bennett,* the question was whether an employer had created a plan by informally distributing some severance benefits to certain workers.

Bennett, at 12-14. In contrast, in this case it was Claimants themselves who acted as both the employer and employee. If there was anyone who was responsible for insuring that these plans were formally approved, it should have been the Claimants. The principles underlying those federal cases simply do not extend to protect the Claimants under the particular facts of this case.

The Claimants also argue that LSI ratified these plans and the trust by not renouncing them earlier. The new LSI Board, however, did not take office until 1994, and arguably did not receive reports concerning the existence of the plans and trust until May or June of 1994. Given the testimony below concerning the state of LSI record keeping and business practices, it was not unreasonable, under these specific facts, for the Board to take action with respect to the plans until six months later in January 1995. That six month period is not a timeframe during which Claimants can claim reliance. We conclude, therefore, that LSI failed to ratify these plans or the trust.

The text of the trust instrument, and the testimony below from trustee Burns, indicate that even after Prescott and Johnson signed the trust documents, the trust would only become irrecovable upon approval by the LSI Board. *See* LSI Trial Ex. 5 at § 1(b). Evidence of that approval is simply missing from the record, and we cannot expect the trustees to treat the trust as irrevocable in the absence of formal Board approval. We would not want to place the trustees in this case, or in future cases, in a position where they would have to make distinctions between whether LSI has formally approved a trust document, informally ratified it, informally rejected it through inaction, or formally rejected it. Imputing approval of the trust and plans to LSI based on the conflicting evidence in

the record below would create precedent in this Court which would make it more difficult for outside professionals hired as trustees for Community resources to do their jobs. We believe the more prudent route is to hold that in the absence of Board approval in conformance with the LSI Articles of Incorporation, there is no evidence LSI approved the trust or the plans, and the trust is therefore revocable.

Since the trustees' original interpleader complaint requests relief broader than the issues presented in this appeal, we remand this case with very specific instructions. Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants. Because the trust was never formally approved by the LSI Board, the trust, by its terms, is revocable, and LSI, as grantor of the trust, is able to revoke the trust. The trust agreement itself states that "Plan participants and their beneficiaries shall have not a preferred claim on, or any beneficial ownership interest in, any assets of the Trust." LSI Trial Ex. 5, at § 1(d). Claimants, therefore, are dismissed from this action because they no longer have an interest in this litigation as articulated in their original motion to intervene or in their answer.

On remand, the trustees are free to present their accounting, consistent with this opinion, to the Trial Court. If necessary, the Trial Court is obviously free to take additional evidence on any of the remaining questions under the trustees' original interpleader complaint.

ORDER

For the foregoing reasons, the Trial Court is reversed, the Claimants are dismissed from this action, and the case is remanded to the Trial Court in order to conduct further proceedings consistent with this opinion.

Dated: October 26, 2001

/s/ Henry Buffalo
Judge Henry M. Buffalo Jr.

/s/ Robert Grey Eagle
Judge Robert A. Grey Eagle